ROBBINS GELLER RUDMAN
& DOWD LLP
SPENCER A. BURKHOLZ (147029)
THOMAS E. EGLER (189871)
SCOTT H. SAHAM (188355)
NATHAN R. LINDELL (248668)
ASHLEY M. ROBINSON (281597)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
spenceb@rgrdlaw.com
tome@rgrdlaw.com
scotts@rgrdlaw.com
nlindell@rgrdlaw.com
arobinson@rgrdlaw.com

KESSLER TOPAZ MELTZER
& CHECK, LLP
ANDREW L. ZIVITZ
SHARAN NIRMUL
KIMBERLY A. JUSTICE
JENNIFER L. JOOST
280 King of Prussia Road
Radnor, PA 19087
Telephone: 610/667-7706
610/667-7056 (fax)
azivitz@ktmc.com
snirmul@ktmc.com
kjustice@ktmc.com
jjoost@ktmc.com

Co-Lead Counsel in the *Luther* and *Western Conference* actions

COHEN MILSTEIN SELLERS
& TOLL PLLC
STEVEN J. TOLL (*pro hac vice*)
JULIE GOLDSMITH REISER (*pro hac vice*)
JOSHUA S. DEVORE (*pro hac vice*)
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, DC 20005-3964
Telephone: 202/408-4600
202/408-4699 (fax)
stoll@cohenmilstein.com
jreiser@cohenmilstein.com
jdevore@cohenmilstein.com

Lead Counsel in the *Maine State* action only

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAINE STATE RETIREMENT SYSTEM, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. COUNTRYWIDE FINANCIAL CORPORATION, et al., Defendants. [Caption continued on following page.]	No. 2:10-cv-00302-MRP(MANx) CLASS ACTION MEMORANDUM IN SUPPORT OF STATEMENT IN NOTICE TO CLASS MEMBERS REGARDING PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES DATE: July 10, 2013 TIME: 1:30 p.m. CTRM: 12, The Honorable Mariana R. Pfaelzer

WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. COUNTRYWIDE FINANCIAL CORPORATION, et al., Defendants.	No. 2:12-cv-05122-MRP(MANx) CLASS ACTION
DAVID H. LUTHER, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. COUNTRYWIDE FINANCIAL CORPORATION, et al., Defendants.	No. 2:12-cv-05125-MRP(MANx) CLASS ACTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

I. INTRODUCTION

After five-plus years of litigation, on June 25, 2013, the parties to the above-captioned actions ("*Luther*," "*Maine State*," and "*Western Conference*," collectively the "Actions") entered into a Stipulation and Agreement of Settlement (the "Settlement Agreement"). Exhibit A-1 to the Settlement Agreement is the proposed Notice Plaintiffs intend to mail to the Class (the "Notice"), advising the Class of the terms of the settlement and, *inter alia*, Plaintiffs' Counsel's intent to request an award of attorneys' fees not to exceed 17% of the Gross Settlement Fund.[1]

On June 26, 2013, the Court requested preliminary support for Plaintiffs' Counsel's forthcoming request for attorneys' fees in advance of the July 10, 2013 hearing on Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. Plaintiffs submit this response, which provides ample support for the 17% fee set forth in the Notice.[2]

---

[1] Unless otherwise noted, capitalized terms shall have those meanings ascribed to them in the Settlement Agreement. During the July 5, 2013 conference, the Court raised the issue of Class scope and Notice to be sent to Class Members. The Class is defined in the Settlement Agreement as all persons who purchased or acquired the Certificates which were the individual securities issued as part of the 429 Offerings. For purposes of the Plan of Allocation, the Certificates are grouped into three categories – the 58 live represented tranches (listed on Exhibit A to the Supplemental Agreement), the 111 dismissed represented tranches (listed on Exhibit B to the Supplemental Agreement) and the 9,214 dismissed unrepresented tranches (listed in Appendix A to the Settlement Agreement along with the other two categories). All three categories of Certificates will be listed on the settlement website (www.countrywidembssettlement.com), which is referenced in the Notice (*see* pages 2, 5, 17 and 20 of the Notice).The Settlement Agreement provides that the Court-appointed Claims Administrator (currently Garden City Group) will mail the Notice to approximately 2,000 nominees (broker/dealers) that have records of purchasers of the Certificates. The nominees will either forward the Notice to the purchasers or provide the Claims Administrator with the necessary contact information so that the Claims Administrator can forward the Notice to the Class.

[2] Plaintiffs respectfully suggest that at this stage, the Court need only preliminarily determine if the request for fees is "within the range of acceptable attorneys' fees" in this Circuit. *See, e.g., Gardner v. GC Servs., LP*, No. 10cv0997-IEG (CAB), 2011 U.S. Dist. LEXIS 126607, at *18 (S.D. Cal. Nov. 1, 2011) (noting "at this [preliminary approval] stage, the request of 30% of the total settlement fund for attorneys' fees appears to be reasonable as it is within the range of acceptable attorney's fees in Ninth Circuit cases," but reserving judgment on reasonableness until

Plaintiffs' Counsel have succeeded in obtaining a Settlement of $500 million cash for the benefit of the Class. This recovery is the ***largest*** class-wide settlement in a mortgage backed security ("MBS") case to date, far surpassing the next largest $315 million settlement reached in *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, No. 1:08-cv-10841-JSR-JLC (S.D.N.Y.) ("Merrill Lynch MBS Settlement") by $185 million. The recovery is also the largest on a per "live"[3] certificate basis – $24.96 per $1,000 certificate versus $19.05 per $1,000 certificate in the Merrill Lynch MBS Settlement. By any measure, this is the best settlement in any MBS class action. Plaintiffs' Counsel achieved this exceptional result for the Class after more than five years of vigorous and extensive litigation followed by seven months of hard-fought settlement negotiations, during which they have not received any compensation for their efforts and have assumed all costs and expenses, despite significant risks of non-recovery. In fact, Plaintiffs' Counsel have persevered through

---

final approval); *see also Carter v. Anderson Merchandisers, LP*, No. EDCV 08-00025-VAP (OPx), 2010 U.S. Dist. LEXIS 7793, at *27 (C.D. Cal. Jan. 7, 2010) (noting a request of attorneys' fees in the amount of 25% of the settlement fund appears reasonable based upon the Ninth Circuit benchmark of 25%, but reserving judgment until presented with a proper fee application). Citations are omitted and emphasis is added throughout unless otherwise indicated.

Moreover, at this juncture, Lead Counsel need only, and have only indicated that they "will apply" for attorneys' fees in an amount of no more than 17% of the Gross Settlement Fund at final approval. *See* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. Dkt. No. 398 at 22; Notice at 23. Indeed, Lead Counsel are not seeking approval of attorneys' fees at this time, but will do so at final approval, based upon a more fulsome showing in conjunction with Plaintiffs' Motion for Final Approval of the Settlement and Request for Attorneys' Fees and Expenses in the Actions, including declarations from Plaintiffs and Plaintiffs' Counsel regarding the fee request.

[3] The Court's tranche-based standing rulings in the Actions have effectively reduced the collective size of the Actions to 58 "live" tranches. Eight of those tranches were sustained by the Court in the *Maine State* action. At the time the Settlement was reached, the Court had not yet ruled on the Defendants' motion to dismiss the *Luther* and *Western Teamsters* cases. Plaintiffs' Counsel's position was that if the Court followed its earlier standing decision in *Maine State*, it would have sustained the claims of an additional 50 unique tranches, thus giving rise to a total of 58 actionable tranches.

numerous adverse rulings at both the California state and federal court levels, litigating issues of first impression in this Circuit and in California state court in order to maintain the viability of the Actions. It was only through Plaintiffs' Counsels' persistence that the Class was able to secure this exceptional settlement. For their substantial efforts on behalf of the Class and in accordance with applicable legal precedent, Plaintiffs' Counsels intend to seek a legal fee award of up to 17% of the Gross Settlement Fund.

The tandem efforts in the *Luther* and *Maine State* litigations, which this Settlement resolves, were critical to the recovery that the Plaintiffs' Counsels have achieved for the Class.

In *Maine State*, Plaintiffs' Counsel actively litigated the Securities Act claims in federal court through several motions to dismiss, class certification, merits discovery and mediation. Plaintiffs' Counsel's efforts in *Maine State* on behalf of the Class included:

- Filing three Amended Consolidated Class Action Complaints in July, 2010; December, 2010; and June, 2011. The second and third complaints addressed the Court's November 2010 and May 2011 Orders that denied, in part, Defendants' motions to dismiss.
- Subpoenaing documents from more than 60 custodian banks, broker dealers, market-makers and investment banks to establish pricing information for the securities at issue as well as trading histories, trading volume of the securities, and numerosity for purposes of class certification pursuant to Rule 23.
- Engaging in motion practice in the Northern District of Illinois to compel third-party document production.
- Responding to discovery requests on behalf of the named plaintiffs from six defendant parties, including producing responsive discovery and subsequently defending their depositions. This effort also included

reviewing productions from Plaintiffs' asset managers and investment consultants. Counsel reviewed over one million pages of documents in connection with its clients' discovery obligations and their motion for class certification.

- Seeking to quash class certification discovery sought from absent class members.
- Retaining and overseeing the work of an expert who was deposed on issues pertaining to numerosity and commonality for purposes of demonstrating that class certification was appropriate.
- Obtaining a stipulation to class certification after filing a motion to certify the class, followed by the implementation of a comprehensive notice program to inform all potential class members of the scope of the certified class and their rights as class members.
- Obtaining and reviewing, in less than 12 months, the documents produced in *In re Countrywide Fin. Corp. Sec. Litig.*, No. 2:07-cv-05295 (C.D. Cal.) ("New York Funds Action"), consisting of approximately 20 million pages; Counsel reviewed 875,000 documents in that production. In particular, Counsel thoroughly reviewed the documents and deposition transcripts from an additional 51 witnesses who had knowledge relevant to the claims at issue in *Maine State*, with the goal of identifying relevant search terms and custodians and also to avoid seeking duplicative discovery. This process also resulted in the identification of 33 additional Countrywide witnesses with knowledge relevant to the claims at issue here, whom had not been custodians in the New York Funds production. In addition, Counsel researched and assured itself that testimony to the SEC and Federal Crisis Investigation Commission ("FCIC") could be used as evidence, as if taken in the *Maine State* litigation.

- Seeking, within the same time period, documents and information related to the viable MBS tranches in *Maine State* from Defendants and numerous non-parties, including loan files and due-diligence results. In total, Plaintiffs' Counsel received over 1.75 million documents related specifically to the *Maine State* claims. During the meet-and-confer process, Countrywide represented that it had retained 400 contract attorneys to review the materials being produced.
- Conducting weekly meet-and-confer meetings with defendants on the status of discovery, document productions, and scheduling depositions.
- Propounding six sets of requests for production on all defendants and on additional requests for production on certain underwriter defendants, as well as follow-up requests that came to light after certain depositions.
- Fully and completely responding to more than 115 contention interrogatories and requests for admission propounded by defendants. Had defendants sought summary judgment, these responses would have formed the basis of the *Maine State* Plaintiffs' opposition.
- Obtaining and working with five separate experts, whose reports were due in less than seven months, including experts in underwriting, investment bank due diligence, loan re-underwriting, certificate valuation, investor losses, damages, and a rebuttal expert on issues of loss causation and negative causation in anticipation of expert reports that Defendants would submit.
- Drafting a mediation statement related to the eight tranches in the *Maine State* litigation.

The *Luther* action was the first and most extensive MBS case filed following the financial crisis. Plaintiffs' Counsel expended exhaustive efforts investigating and understanding the complicated issues related to the origination, underwriting, securitization, rating, and sale of the loans at issue. There was no pre-existing road-

map for Plaintiffs' Counsel to follow. At every turn there were unique issues not usually seen in a typical securities class action related to standing, statutes of limitations and repose, class certification, liability, loss causation and damages.[4]

The following are representative examples of the work Plaintiffs' Counsel performed in *Luther* over the past five and a half years:

- Investigated the substance of and filed extensive complaints in November 2007, June 2008, September 2008 and October 2008.
- Successfully litigated Defendants' 2008 removal of the action to federal court, before this Court and the Ninth Circuit Court of Appeals. *See* Order Granting Plaintiff's Motion for Remand to State Court and Denying an Award of Attorney's Fees and Expenses, No. 2:07-cv-08165-MRP-MAN (C.D. Cal. Feb. 28, 2008), Dkt. No. 26; Opinion, No. 08-55865 (9th Cir. July 16, 2008).
- Filed an opposition to Defendants' Motion to Stay Discovery in October 2008.
- Prepared an opposition to Defendants' demurrers (related to jurisdiction, liability, loss causation and damages) to Plaintiffs' Complaint in 2009.
- Prepared and propounded requests for production of documents and interrogatories on Defendants and third parties, and met and conferred on such discovery.
- Filed and briefed a Complaint for Declaratory Relief in this Court concerning whether SLUSA precludes state court jurisdiction over matters commenced under the Securities Act. *Luther v. Countrywide*

---

[4] As the Court noted during the hearing on Defendants' motions to dismiss, securitizations, such as MBS, represented a new area for securities law in that legal issues arising from securitizations did "not easily fit in these slots under the prior law that dealt with stock, or bonds, or offerings of various kinds." March 13, 2013 Hearing Transcript at 40.

Fin. Corp., No. 2:09-cv-06162-MRP (MANx), Dkt. No. 1 (Aug. 24, 2009).

- On January 14, 2010, after the state court's dismissal on jurisdictional grounds, Maine State Retirement System filed an action in federal court in an effort to preserve the statute of limitations of the Class's Securities Act claims.
- Litigated and won a state court appeal, which reversed the trial court's demurrer ruling dismissing the *Luther* matter on jurisdictional grounds. Order, No. B222889 (2d App. Div. May 18, 2011).
- Filed an answer to Defendants' Petition for Review of the California Court of Appeal's reversal of the state court dismissal.
- Prepared an opposition to Defendants' new demurrer (related to standing, statute of limitations, and statute of repose) along with oppositions to demurrers filed by certain of the Individual Defendants.
- After a second removal to this Court by Defendants, fully briefed and argued a motion for remand.
- Prepared an extensive opposition to Defendants' motion to dismiss that was pending at the time of settlement, along with oppositions to certain Individual Defendants' motions to dismiss and Bank of America's motion to dismiss the *Western Conference* action.
- Since 2009, Plaintiffs received 20 million pages of documents from Defendants and commenced an efficient review of the documents. Plaintiffs' Counsel performed targeted searches of and reviewed, coded, and analyzed over 5.5 million of the 20 million pages in order to prepare for mediation, further discovery, summary judgment and trial. Plaintiffs' Counsel also reviewed publicly-available documents, such as information produced regarding Countrywide by the FCIC.

- Throughout the five years of litigation, worked with consultants and experts on complicated issues related to loan underwriting, econometric and statistical analysis of loan pools, securities ratings, loan-to-value ratios, owner occupied rates, loss causation, and damages.
- Prepared detailed mediation statements and presentations, and worked with damages experts in connection with the mediation.

Notably, Plaintiffs' Counsel's filing of and efforts in the *Luther* action protected a potential recovery for Class Members who purchased the 58 live tranches. Indeed, but for the successful appeal resulting in the reversal of the state court's dismissal of *Luther* on jurisdictional grounds in 2011, all of the Countrywide MBS tranches would have been dismissed and ***there would have been no recovery for the Class*** following this Court's ruling in *Strategic Capital Bank v. Countrywide Fin. Corp.*, No. 2:12-cv-04354-MRP-MAN, (C.D. Cal. Nov. 21, 2012) ("*Strategic Capital*"), Dkt. No. 65.[5]

In addition to their litigation efforts, Plaintiffs' Counsel in *Maine State* and *Luther/Western Conference* engaged in protracted settlement negotiations over a period of seven months with Defendants and the assistance of mediator Eric Green that resulted in an incredible recovery for the Class. The mediation process also included separate negotiations with the Honorable Nancy Gertner (retired) on an appropriate plan of allocation for the $500 million settlement. It was the independent and complementary efforts of Plaintiffs' Counsel in both *Luther* and *Maine State* that led to this exceptional settlement.

Importantly, Plaintiffs' Counsels' 17% fee request has been approved by each of the Plaintiffs in the Actions, which include three sophisticated state pension funds (Iowa, Maine and Vermont) with large stakes in the outcome of this litigation. These

---

[5] This Court in *Strategic Capital* held that the filing of the *Luther* case in state court did not toll the statute of limitations for Securities Act cases concerning Countrywide MBS filed later in federal court, rendering them time-barred in the absence of a successful appeal. Dkt. No. 65 at 23-24.

Plaintiffs are exceptionally proud of the results achieved in the Actions and the efforts both they and Plaintiffs' Counsels expended in achieving them. As noted above, Plaintiffs intend to file declarations in support of final approval of the Settlement and Plaintiffs' Counsels' fee request.

The attorneys' fee that Plaintiffs' Counsel intend to request is fair and reasonable and accords with the legal fees requested and awarded in both other MBS cases, as well as securities class action cases in this jurisdiction and elsewhere. In the Merrill Lynch MBS Settlement, the court awarded a 17% fee after less than three years of litigation. In *In re Wells Fargo Mortg.-Backed Certificates Litig.*, No. 09-CV-1376-LHK, slip op., ¶4 (N.D. Cal. Nov. 14, 2011) (Dkt. No. 475) ("Wells Fargo MBS Settlement"), after only just over two years of litigation, the United States District Court for the Northern District of California awarded a fee of 19.75% of a $125 million settlement. *See also In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03-MD-1529, 2006 U.S. Dist. LEXIS 84621, at *16 (S.D.N.Y. Nov. 16, 2006) (21.4% fee in $460 million settlement); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 755 (S.D. Ohio 2007) (18% fee in $600 million settlement); *In re BankAmerica Corp. Sec. Litig.*, No. 99-MD-1264, slip op. (E.D. Mo. Oct. 15, 2002) (18% fee in $490 million settlement); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 430 (D.N.J. 2004) (Dkt. No. 575) (17% fee in $667 million settlement).

Although reasonable under the percentage method adopted by this Circuit, the requested fee of 17% ($85 million) is also fair and reasonable under the lodestar cross-check. As of June 30, 2013, Plaintiffs' Counsels expended a lodestar (number of hours multiplied by per hour rate) of approximately $39 million in litigating the

Actions and advanced approximately $3.5 million in expenses.[6] The resulting multiplier of 2.2 is comparable or lower than those approved in similar cases. *See, e.g.*, *Vizcaino v. Microsoft*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming a fee that yielded a multiplier of 3.65 and noting that multipliers ranging from 1-4 are normally applied in common fund cases). *See* Merrill Lynch MBS Settlement (2.3 multiplier on 17% fee in $315 million settlement); Wells Fargo MBS Settlement (2.82 multiplier on 19.75% fee of $125 million settlement). *See also Cardinal Health*, 528 F. Supp. 2d at 755 (5.9 multiplier on 18% fee in $600 million settlement).

This was not a case where a settlement was achieved at an early stage – the first action was filed ***more than five years*** ago. Moreover, Plaintiffs' Counsel prosecuted the Actions on a wholly contingent basis since the inception of *Luther* in 2007, receiving no payment for their efforts while being constantly exposed to the possibility that they would achieve no recovery at all and, therefore, no compensation.[7]

The risk of obtaining a smaller or even no recovery at trial was very substantial in this matter, just as it is in any major complex securities litigation. However, in this matter, the risk was greater than normal given the numerous novel legal and factual issues facing Plaintiffs in these MBS Actions. In fact, if the *Luther* Plaintiffs had not appealed and won the state court appeal in 2011, the Class would have had no viable claims following the Court's November 2012 *Strategic Capital* decision. These risks

---

[6] Plaintiffs' Counsels will submit detailed declarations of time spent by each timekeeper for Lead Counsel, and the other law firms working at their direction, in support of Plaintiffs' Final Approval papers.

[7] Moreover, Plaintiffs' Counsels will continue to expend considerable time in connection with obtaining preliminary and final approval of the Settlement, and once Notice is mailed, responding to inquiries from Class Members and assisting Class Members with their Proof of Claim forms. As the Court is aware, this Notice is being sent to purchasers of over 9,000 tranches and, thus, Plaintiffs' Counsels will be responsible for administering and responding to extensive questions and issues that will inevitably arise in settlements of this breadth and complexity.

undertaken by Plaintiffs' Counsel on behalf of Plaintiffs and the Class, purely on a contingency basis, warrant the application of the reasonable multiplier of 2.2 to Plaintiffs' Counsel's lodestar. This risk premium is typically applied to a lodestar to compensate counsel for the possibility that they will not recover anything at all and for laying out time and expense over the lengthy course of litigation. For example, in the *Oracle Securities Litigation*, Robbins Geller expended tens of millions in attorney time and expenses only to see the case dismissed in its entirety at summary judgment. Similarly, Kessler Topaz expended millions litigating the *BankAtlantic Securities Litigation* through trial and a jury verdict in plaintiffs' favor, only to have the court overturn the verdict and enter judgment for defendants. Furthermore, given their novelty, the Actions presented more obstacles than the average securities class action. Here, standing, class certification, liability, loss causation and damages issues were complicated and rife with potential pitfalls. At every stage of the litigation, new issues arose, and the Court issued procedural and substantive rulings that considerably affected the scope and viability of the Actions. Despite Defendants' aggressive efforts and the real risks of continued litigation (including a potential bankruptcy of Countrywide), Plaintiffs' Counsel achieved an exceptional recovery for the Class. Plaintiffs' Counsel should be rewarded with a reasonable fee for their efforts and to incentivize them to hold out and negotiate for the largest settlement for the Class with the understanding that they could also benefit and not be limited in their fee request. Fee awards should encourage lawyers to take on the risks involved in prosecuting cases on behalf of investors by rewarding them for their successful efforts.

In sum, at the preliminary approval stage, where the Court's role is to determine if there is adequate support for the statements in the Notice rather than make a final determination on the merits of the attorneys' fee request, Plaintiffs' Counsel submit that there is ample support for the up to 17% attorney fee request set forth in the Notice.

II. THE STANDARDS GOVERNING THE AWARD OF ATTORNEYS' FEES IN COMMON FUND CASES

A. Plaintiffs' Counsel Are Entitled to a Fee from the Common Fund They Created

It is well-settled that an attorney who maintains a suit that results in the creation of a fund or benefit in which others have a common interest is entitled to obtain reasonable fees from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676, 681 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

In addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of people, and to discourage future alleged misconduct of a similar nature. *See, e.g.*, *Dolgow v. Anderson*, 43 F.R.D. 472, 481-84 (E.D.N.Y. 1968). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S. Ct. 2622, 2628, 86 L. Ed. 2d 215, 224 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423, 428 (1964)).

B. The Ninth Circuit Supports Awarding Attorneys' Fees Using the Percentage Approach

The Supreme Court has also consistently held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fees should be determined as a percentage of the fund. *See, e.g.*, *Boeing*, 444 U.S. at 478-79, 100 S. Ct. at 749, 62 L. Ed. 2d at 682. By 1984, this point was so well established that the Supreme Court needed no more than a footnote to address it in *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 1550 n.16, 79 L. Ed. 2d 891, 903 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is

based on a percentage of the fund bestowed on the class."). *See also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8, 1985) (fee awards in common fund cases have historically been computed based upon a percentage of the fund); 1 Alba Conte, *Attorney Fee Awards* §2.02, at 31-32 (2d ed. 1993) (same). Although district courts retain discretion to award attorney's fees in common fund cases based upon either the percentage-of-fund or lodestar method, *see In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) ("*WPPSS*"), the Ninth Circuit has implicitly endorsed use of the percentage-of-fund method in most cases. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1047-48; *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

III. THE REQUESTED FEE IS REASONABLE UNDER THE PERCENTAGE-OF-RECOVERY METHOD

While the ultimate determination of the proper amount of attorneys' fees rests within the sound discretion of the district court, *see Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012); *see also Garcia v. Gordon Trucking, Inc.*, No. 10-cv-0324 AWI SKO, 2012 U.S. Dist. LEXIS 160052, at *22 (E.D. Cal. Oct. 29, 2012), the guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009). The Ninth Circuit has approved a number of factors that are relevant to the district court's determination including the: (1) result achieved, (2) risk of continued litigation, (3) financial burden of contingent representation, and (4) customary fees awarded in similar cases. *See Vizcaino*, 290 F.3d 1043. As demonstrated below, application of these factors confirms the reasonableness of and warrants including an up to 17% fee request in the Notice to Class Members.

A. The Result Achieved

Courts have consistently recognized that the result achieved is a major factor to be considered in determining the reasonableness of a fee award. *Hensley v. Eckerhart*,

461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983) ("most critical factor is the degree of success obtained"); *Vizcaino*, *supra*, 290 F. 3d at 1250.

As noted above, this is the largest MBS class action settlement arising out of the subprime crisis. It is 59% larger than the $315 million Merrill Lynch MBS Settlement, which was formerly the largest MBS settlement. It also provides for a greater recovery on a per "live" certificate basis ($24.96 versus $19.05 per $1,000 certificate in the Merrill Lynch MBS Settlement). By any measure, it is the best MBS class settlement. The Settlement is one of the largest (top 20) class action securities settlements of all time. *See* Securities Class Action Services, "The SCAS 'TOP 100 Settlements Semi-Annual Report'" (Dec. 2012). It was due to the tenacious efforts of Plaintiffs' Counsel, as described herein, and in Plaintiffs' forthcoming submission in connection with final approval of the Settlement that led to this exceptional result.

B. The Risks of the Litigation and the Novelty and Difficulty of the Questions Presented

Numerous cases have recognized that risk, as well as the novelty and difficulty of the issues presented, are important factors in determining an appropriate fee award. *E.g.*, *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300.

There is no question that from the outset, the Actions presented a number of sharply contested legal and factual issues and that Plaintiffs faced formidable defenses to liability and damages. MBS actions involve complex legal and factual issues under the federal securities laws and present novel issues upon which district courts and even circuit courts have ruled differently, particularly in the context of standing. Beyond these hurdles, throughout the litigation Defendants have adamantly denied liability and asserted that they had absolute defenses to Plaintiffs' claims, including most notably, that the recession rather than their own conduct caused Plaintiffs' losses. *See Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004)

(concluding that district court properly weighed risk when it evaluated defendant's belief that it had strong case on merits supporting finding of risk).[8] Furthermore, if *Luther* was not revived by the California Appeals Court in 2011, four years of litigation by *Luther*'s counsel would have returned nothing. Also, the Court's *Strategic Capital* decision could have resulted in the dismissal of the *Maine State* action after almost three years of litigation by *Maine State* counsel.

C. The Contingent Fee Nature of the Case and the Financial Burden Carried by Plaintiffs' Lead Counsel

It is also well-settled that a determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that Plaintiffs' Counsel have overcome in obtaining the settlement.

It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value

---

[8] Some courts also look at the skill required and the quality and efficiency of the work. *See Rodriguez v. D.M. Camp & Sons*, No. 1:09-cv-00700-AWI-JLT, 2013 U.S. Dist. LEXIS 69282, at *36 (E.D. Cal. May 15, 2013) ("The complexity of issues and skills required may support a fee award greater than the benchmark."). Plaintiffs' Counsel committed considerable resources and time in the research, investigation, and litigation of this matter, at the expense of their other litigation matters. Counsel in both *Maine State* and *Luther/Western Conference* prosecuted in an efficient manner the complementary actions that involved eight tranches and 50 other tranches, respectively. Although some of the discovery was similar, discovery on a tranche-specific basis had to be performed in terms of proof at trial. Based upon Plaintiffs' Counsel's diligent efforts on behalf of the Class and their skill and reputation, Plaintiffs' Counsel were able to negotiate a favorable result under difficult and challenging circumstances. The quality of opposing counsel is also important in evaluating the quality of the work done by Plaintiffs' Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Plaintiffs' Counsel were opposed in the Actions by very skilled and highly respected counsel from Goodwin Procter and eight other law firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. These counsel fought Plaintiffs' Counsel at every turn, necessitating Plaintiffs' Counsel's outlay of approximately $3.5 million in expenses and expenditure of approximately $39 million in attorney time since November 2007, and further supporting Plaintiffs' Counsel's fee request.

of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *WPPSS*, 19 F.3d at 1299.

As noted above, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and efforts. For example, in the *Oracle Securities Litigation*, Robbins Geller expended tens of millions in attorney time and expenses only to see the case dismissed in its entirety at summary judgment. Similarly, Kessler Topaz expended millions litigating the *BankAtlantic Securities Litigation* through trial and a jury verdict in plaintiffs' favor, only to have the court overturn the verdict and enter judgment for the defendants. *See In re BankAtlantic Bancorp, Inc.*, No. 07-61542-CIV, 2011 WL 1585605 (S. D. Fla. Apr. 25, 2011). As the court in *Xcel* recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Even counsel who steer their clients past summary judgment and succeed at trial may find their judgment overturned on appeal or on a post-trial motion.[9]

---

[9] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486-CW(EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608, at *1-*2 (N.D. Cal. Sept. 6, 1991) (verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was

Because the fee in the Actions was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable effort. Plaintiffs' Counsel committed significant resources of both time and money to the vigorous and successful prosecution of the Actions for the benefit of the Class, strongly militating in favor of awarding the requested fee.

D. A 17% Fee Award Is Consistent with the Awards in Similar Complex, Contingent, Securities Litigation

Courts often look to fees awarded in comparable cases to determine if the requested fee is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. A 17% fee award is consistent with awards in similar complex, securities class action litigation. *See Adelphia*, 2006 U.S. Dist. LEXIS 84621, at *16 (21.4% fee in $460 million settlement); *Cardinal Health*, 528 F. Supp. 2d at 755 (18% fee in $600 million settlement); *BankAmerica*, No. 99-MD-1264, slip op. (18% fee in $490 million settlement); *Lucent Techs.*, 327 F. Supp. 2d at 430 (17% fee in $667 million settlement).

MBS class actions arguably involve more risky and complex issues than traditional securities class actions, including the risk of unique standing, tolling, class certification, loss causation and damages issues. This case presented an additional layer of risk given the Court's decision that Bank of America was not liable for Countrywide's liabilities in these Actions, and Countrywide's concession that it was and still is considering filing for bankruptcy protection. In the most comparable, albeit less successful, MBS settlement – *Merrill Lynch* – the court awarded 17% of the $325 million settlement fund. Similarly, in the *Wells Fargo* MBS matter, the court awarded counsel a fee of 19.75%. Plaintiffs' Counsel's request for a 17% fee in a

---

denied, on appeal the judgment was reversed and the case was dismissed – after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial).

more protracted and successful litigation is thus clearly in line with fee awards in similar securities and MBS class action litigation.

IV. THE REQUESTED FEE IS REASONABLE UNDER THE LODESTAR CROSS-CHECK

Application of the *Vizcaino* factors demonstrates that the requested fee is fair and reasonable, and is not "clearly excessive," thereby alleviating the need for the court to apply a lodestar cross-check. However, as noted above, even if the lodestar cross-check is applied, the requested fee is still fair and reasonable.

The lodestar method, as set forth in the seminal cases *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) ("*Lindy I*") and *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*"), is a two-step process. *See Lindy I*, 487 F.2d at 167-68. The first step requires ascertaining the "lodestar" figure by multiplying the number of hours reasonably worked by the current hourly rate of counsel. *Id.* at 167. "Calculation of the lodestar, however, is simply the beginning of the analysis." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff'd*, 798 F.3d 35 (2d Cir. 1986). In the second step of the analysis, a court adjusts the lodestar to take into account, among other things, the risk of non-payment, the result achieved, the quality of representation, the complexity and magnitude of the litigation, and public policy considerations. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998). To account for the foregoing factors the court then applies an appropriate multiplier to the lodestar number.

The lodestar for the services performed by Plaintiffs' Counsels in these Actions are approximately $39 million. Therefore, the requested fee of 17% ($85 million) represents a multiplier of approximately 2.2 times Plaintiffs' Counsels' lodestar. This multiplier is comparable or lower than those awarded by other courts in similar cases, thus demonstrating the reasonableness of the requested fee. *See* Merrill Lynch MBS

Settlement (2.3 multiplier); Wells Fargo MBS Settlement (2.8 multiplier); *see also Cardinal Health*, 528 F. Supp. 2d at 755 (multiplier of 5.9 for a $108 million fee in a $600 million settlement); *Adelphia*, 2006 U.S. Dist. LEXIS 84621, at *16 (2.89 multiplier for a $97.36 million fee in a $460 million settlement); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (3.97 multiplier for a $143.7 million fee in a $1.027 billion settlement). A multiplier of time is needed to reward attorneys for assuming the risk of non-payment in these highly risky, complex MBS class actions. Thus, the requested fee is plainly reasonable under both the percentage method and the lodestar cross-check method. Additional support will be provided in connection with Plaintiffs' Motion for Final Approval.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully requests that the Court issue the Notice that includes Plaintiffs' Counsel's intention to apply for an award of attorneys' fees of up to 17% of the Gross Settlement Fund.

DATED: July 8, 2013

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SPENCER A. BURKHOLZ
THOMAS E. EGLER
SCOTT H. SAHAM
NATHAN R. LINDELL
ASHLEY M. ROBINSON

s/ SPENCER A. BURKHOLZ
SPENCER A. BURKHOLZ

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

KESSLER TOPAZ MELTZER
& CHECK, LLP
ANDREW L. ZIVITZ
SHARAN NIRMUL
KIMBERLY JUSTICE
JENNIFER L. JOOST

s/ ANDREW L. ZIVITZ
ANDREW L. ZIVITZ

280 King of Prussia Road
Radnor, PA 19087
Telephone: 610/667-7706
610/667-7056 (fax)

Co-Lead Counsel for Plaintiffs and the Class in the *Luther* and *Western Conference* actions

DEUTSCH & LIPNER
SETH E. LIPNER
1325 Franklin Avenue, Suite 225
Garden City, NY 11530
Telephone: 516/294-8899
516/742-9416 (fax)

THE MEHDI FIRM
AZRA Z. MEHDI
One Market
Spear Tower, Suite 3600
San Francisco, CA 94105
Telephone: 415/293-8039
415/293-8001 (fax)

Additional Counsel for Plaintiff in the *Luther* action

COHEN MILSTEIN SELLERS
& TOLL PLLC
STEVEN J. TOLL (*pro hac vice*)
JULIE GOLDSMITH REISER (*pro hac vice*)
JOSHUA S. DEVORE (*pro hac vice*)

s/ STEVEN J. TOLL
STEVEN J. TOLL

1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, DC 20005-3964
Telephone: 202/408-4600
202/408-4699 (fax)

COHEN MILSTEIN SELLERS
& TOLL PLLC
JOEL P. LAITMAN (*pro hac vice*)
CHRISTOPHER LOMETTI (*pro hac vice*)
RICHARD SPEIRS (*pro hac vice*)
DANIEL B. REHNS (*pro hac vice*)
77 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212/838-7797
212/838-7745 (fax)

Lead Counsel for Plaintiffs and the Class in the *Maine State* action only

GLANCY BINKOW &
GOLDBERG LLP
MICHAEL GOLDBERG
LIONEL Z. GLANCY
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067
Telephone: 310/201-9150
310/201-9106 (fax)

Liaison Counsel for Plaintiffs in the *Maine State* action

KIRBY McINERNEY LLP
IRA M. PRESS
RANDALL K. BERGER
825 Third Avenue, 16th Floor
New York, NY 10022
Telephone: 212/371-6600
212/751-2540 (FAX)

Additional Counsel for United Methodist Churches Benefit Board, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 8, 2013.

s/ SPENCER A. BURKHOLZ
SPENCER A. BURKHOLZ

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: spenceb@rgrdlaw.com

Mailing Information for a Case 2:12-cv-05125-MRP-MAN

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Leiv H Blad , Jr**
  leiv.blad@bingham.com

- **Spencer Alan Burkholz**
  spenceb@rgrdlaw.com,e_file_sd@rgrdlaw.com

- **Christopher G Caldwell**
  caldwell@caldwell-leslie.com,hammer@caldwell-leslie.com, ,hong@caldwell-leslie.com,perigoe@caldwell-leslie.com,pettit@caldwell-leslie.com,records@caldwell-leslie.com,hayes@caldwell-leslie.com,popescu@caldwell-leslie.com,strother@caldwell-leslie.com,wilson@caldwell-leslie.com

- **Michelle K Camp**
  mpulley@gibsondunn.com

- **Matthew D Caplan**
  matthew.caplan@dlapiper.com,susan.byrd@dlapiper.com

- **Michele E Connolly**
  mconnolly@goodwinprocter.com

- **Brian Charles Devine**
  bdevine@goodwinprocter.com,ABoivin@goodwinprocter.com

- **Rajiv S Dharnidharka**
  rajiv.dharnidharka@dlapiper.com

- **Jenifer Q Doan**
  jeniferdoan@paulhastings.com,jenniferroussillon@paulhastings.com

- **Daniel S Drosman**
  ddrosman@rgrdlaw.com,tholindrake@rgrdlaw.com,e_file_sd@rgrdlaw.com

- **Thomas E Egler**
  tome@rgrdlaw.com,jillk@rgrdlaw.com

- **John O Farley**
  jfarley@goodwinprocter.com

- **Inez H Friedman-Boyce**
  ifriedmanboyce@goodwinprocter.com,MConnolly@goodwinprocter.com

- **Jeanne A Fugate**
  fugate@caldwell-leslie.com,records@caldwell-leslie.com,harper@caldwell-leslie.com

- **Joshua G Hamilton**
  joshuahamilton@paulhastings.com,melmanahan@paulhastings.com,lindayoung@paulhastings.com

- **Jennifer L Joost**
  jjoost@ktmc.com

- **Kimberly A Justice**
  kjustice@ktmc.com,dpotts@ktmc.com

- **Deborah Kang**
  deborahkang@paulhastings.com

- **Dean J Kitchens**
  dkitchens@gibsondunn.com,MOstrye@gibsondunn.com

- **Jennifer Y Lai**
  jlai@leonardcarder.com

- **Seth E Lipner**
  proflipner@aol.com

- **Teodora Manolova**
  tmanolova@goodwinprocter.com
- **Azra Z Mehdi**
  azram@themehdifirm.com,ghamilton@themehdifirm.com
- **Alexander K Mircheff**
  amircheff@gibsondunn.com,mostrye@gibsondunn.com,inewman@gibsondunn.com,cnowlin@gibsondunn.com,mpulley@gibsondunn.com
- **Nicolas Morgan**
  nicolas.morgan@dlapiper.com,sonji.leblanc@dlapiper.com,paul.puzon@dlapiper.com
- **Sharan Nirmul**
  snirmul@ktmc.com,mswift@ktmc.com
- **Christopher Anthony Nowlin**
  cnowlin@gibsondunn.com,hkim@gibsondunn.com
- **Brian E Pastuszenski**
  bpastuszenski@goodwinprocter.com,aboivin@goodwinprocter.com,ashapiro@goodwinprocter.com
- **Eric Stephen Pettit**
  pettit@caldwell-leslie.com,records@caldwell-leslie.com
- **David A Priebe**
  david.priebe@dlapiper.com,carmen.manzano@dlapiper.com
- **Ashley M Robinson**
  ashleyr@rgrdlaw.com
- **Scott H Saham**
  scotts@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Jennifer M Sepic**
  jennifer.sepic@bingham.com
- **William F Sullivan**
  williamsullivan@paulhastings.com,lisavermeulen@paulhastings.com,lindayoung@paulhastings.com
- **Michael C Tu**
  mtu@orrick.com
- **Avi N Wagner**
  avi@thewagnerfirm.com,anwagneresq@hotmail.com
- **Shirli Fabbri Weiss**
  shirli.weiss@dlapiper.com,emiko.gonzales@dlapiper.com
- **Lloyd Winawer**
  lwinawer@goodwinprocter.com,cburgos@goodwinprocter.com
- **Andrew L Zivitz**
  azivitz@ktmc.com,dpotts@ktmc.com,jenck@ktmc.com,cchiappinelli@ktmc.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)